

Roberson v. Adams, No. 04-57201

MAR 07 2006

PAEZ, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully disagree with the majority's conclusion that Roberson's attorney's advice to reject the thirteen-year plea offer satisfied the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984), for effective assistance of counsel.

As the record reflects, upon taking over the case from a prior attorney, trial counsel advised Roberson to reject the thirteen-year offer because she was unfamiliar with the case, believed she could procure a better offer, and believed she could win at trial. I agree with the majority that this advice did not constitute ineffective assistance of counsel; but counsel's duty to advise her client did not end there.

Counsel had a continuing duty to "keep [her] client informed of the developments in the case" and to "explain developments in the case to the extent reasonably necessary to permit [him] to make informed decisions regarding [his] representation." ABA Standards for Criminal Justice 4-3.8 (3d ed. 1993) ("The Defense Function"); *see Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice . . . ('The Defense Function'), are guides to determining what is reasonable . . ."). Counsel stated in a declaration that

Roberson “continually asked [her] if the [thirteen-year] offer was still open.”

Despite Roberson’s repeated protestations that he did not want to go to trial and risk a life sentence, it appears counsel never explained to Roberson that trial was beginning or that the thirteen-year deal no longer would be available. Roberson testified before the district court that he did not understand that his trial was commencing or that the plea offer was no longer available until it was too late.

Counsel’s failure to adequately discuss the offer with Roberson on the eve of trial rendered her advice to reject the offer *at that time* objectively unreasonable. When no new offer was forthcoming, and in light of Roberson’s recurring inquiries about the thirteen-year offer, counsel had an obligation to discuss the offer and its expiration upon the commencement of trial with Roberson. Her apparent failure to do so fell below the level of competence required of defense attorneys. Concluding otherwise, in my view, is an unreasonable application of *Strickland*. See 28 U.S.C. § 2254(d)(1).

It is undisputed that both Roberson and the trial judge were poised to accept the thirteen-year offer. It is also undisputed that the offer remained open until jury selection and possibly later. Roberson has satisfied the prejudice prong of *Strickland* by “show[ing] that, but for counsel’s error[], he would have pleaded guilty and would not have insisted on going to trial.” *Turner v. Calderon*, 281 F.3d

851, 879 (9th Cir. 2002).

Because the district court explicitly declined to decide whether counsel adequately explained or discussed the thirteen-year plea offer and that rejecting it meant going to trial, I would vacate the judgment and remand to the district court for additional factual findings. On remand, I would instruct the court to hold an evidentiary hearing on this issue, if it is disputed, and to grant Roberson's petition for a writ of habeas corpus if the court concludes that counsel did not adequately explain or discuss the thirteen-year plea offer and that rejecting it meant going to trial. *See Horton v. Mayle*, 408 F.3d 570, 578-82 (9th Cir. 2005).

For the above reasons, I respectfully dissent.